Supreme Court, U.S.
FILED
OCT 7 2003
OFFICE OF THE CLERK

No. 03-281

IN THE

Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

SUZUKI MOTOR CORP.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Joseph W. Cotchett
Frank Pitre
Steven N. Williams
COTCHETT, PITRE, SIMON & MCCARTHY
840 Malcolm Rd., Suite 200
Burlingame, CA 94010

Michael N. Pollet
(Counsel of Record)
CONSUMERS UNION OF UNITED STATES, INC.
101 Truman Ave.
Yonkers, NY 10703-1057
(914) 378-2000

Barry G. West
Corey E. Klein
GAIMS, WEIL, WEST & EPSTEIN, LLP
1875 Century Park East
Los Angeles, CA 90067

October 8, 2003

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
I. Certiorari Is Warranted To Review The Ninth Circuit's Holding That, On Summary Judgment, "Independent Examination" Only Permits The Court To Review The Record For Evidence Supporting The Plaintiff. 2
II. Certiorari Is Warranted To Review The Ninth Circuit's Holding That Publishers May Be Held Liable Based On Their Disagreement With The Government Or Their Financial Condition. 9
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Anderson v. *Liberty Lobby*, 477 U.S. 242 (1986).....1, 8
Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).....2
City of Cuyahoga Falls v. *Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (2003).....1
Dastar Corp. v. *20th Century Fox*, 123 S. Ct. 2041 (2003).....1
Franchise Tax Bd. v. *Hyatt*, 123 S. Ct. 1683 (2003).....1
Harte-Hanks Communications v. *Connaughton*, 491 U.S. 657 (1989).....10
Masson v. *New Yorker Magazine*, 501 U.S. 496 (1991).....8
Nevada Dep't of Human Resources v. *Hibbs*, 123 S. Ct. 1972 (2003).....1
Nike v. *Kasky*, 123 S. Ct. 2554 (2003).....2
Pierce County v. *Guillen*, 537 U.S. 129 (2003).....2
United States v. *Navajo Nation*, 537 U.S. 488 (2003).....1
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003).....2

Statutes

28 U.S.C. 1257.....2

Other Authorities

Harry Stoffer, *Driving Tests Expand Rollover Ratings*, Automotive News, Oct. 6, 2003.....10
Protect a Consumer Ally, L.A. Times, Aug. 27, 2003.....1
Summary Misjudgment: The U.S. Supreme Court Faces Its Most Important Libel Law Ruling In Decades, If The Justices Will Only Take The Case, Editor & Publisher, Sept. 29, 2003.....9
Wright & Miller, Federal Practice & Procedure (2000).....3

REPLY BRIEF FOR THE PETITIONER

The petition and *amicus* briefs demonstrated that the "independent examination" rule of *New York Times* v. *Sullivan* serves a vital role in effectuating the First Amendment's protections on summary judgment. As Suzuki concedes, other circuits "uniform[ly]" apply the "independent examination" rule on summary judgment just as they do after trial (BIO 17), such that "an appellate court must review the entire record, not just the plaintiff's evidence" (*id.* 18). *All* of the thirteen judges who have applied that standard have found that Suzuki's claim fails First Amendment scrutiny because the isolated evidence Suzuki wrenches from context is completely overborne by the record as a whole. As petitioner shows herein, the panel majority avoided that conclusion only by holding that "independent examination" at the summary judgment stage merely entails searching the record for evidence supporting the plaintiff, a rule that chills expression and thereby threatens "the future of all independent product reviews" (*Protect a Consumer Ally*, L.A. Times, Aug. 27, 2003, at 12), which can be a matter of "life-or-death" (Pet. App. 64a (Kozinski, J.)). See generally Insur. Inst. Br.; Pet. App. 44a (Ferguson, J.) (recognizing circuit conflict).

Review of the circuit conflict is appropriate now (contra BIO 28-30) because the court of appeals resolved CU's entitlement to summary judgment. Suzuki cannot and does not contend that a trial on remand will illuminate the questions presented or raise issues meriting certiorari. As illustrated by *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), which arose in the identical posture, this Court's practice in federal cases is to grant certiorari if, as here, the federal question presented has been resolved below.[1] Review is particularly appropriate now

---

[1] See, *e.g.*, *Dastar Corp.* v. *20th Century Fox*, 123 S. Ct. 2041 (2003); *Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003); *Franchise Tax Bd.* v. *Hyatt*, 123 S. Ct. 1683 (2003); *City of Cuyahoga Falls* v. *Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (2003); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003); *United States* v. *White Mountain Apache Tribe*, 537

because the First Amendment's role in this context is to protect speakers by avoiding the wasteful burdens of unwarranted trials. If the trial occurs, that protection is lost. See Media Br. 16-17.

Suzuki also ignores that this case presents the perfect opportunity for this Court to fulfill its "vitally important" role (*Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984)), in elucidating the application of the actual malice standard through "case-by-case adjudication" (*Harte-Hanks*, 491 U.S. at 686). This case is the polar opposite of *Nike* v. *Kasky*, 123 S. Ct. 2554 (2003), a *state court* case in which *no* record had been developed notwithstanding the fact that the question presented – whether the petitioner's statements were "commercial speech" – turned on the as-yet-unexplored nature and context of those statements. Not only is the summary judgment record here singularly well developed, but the lower courts produced five opinions exploring how the questions presented should be resolved.[2]

I. Certiorari Is Warranted To Review The Ninth Circuit's Holding That, On Summary Judgment, "Independent Examination" Only Permits The Court To Review The Record For Evidence Supporting The Plaintiff.

1. As is the practice in defamation and libel litigation, after exhaustive discovery, CU moved for summary judgment on the ground that, assuming *arguendo* that its published statements were false, it had not acted with "actual malice." The issue is accordingly whether, even assuming that CU's tests did not support its opinion that the Suzuki Samurai presents a serious rollover risk, the record could support a finding of clear and

---

U.S. 465 (2003); *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). Contra BIO 29 n.17 (erroneously relying on state court finality standard of 28 U.S.C. 1257).

[2] The *New York Times* standard obviously applies here. Contra BIO 30 n.18. Whatever the rule when a *business* disparages a *competitor*, when a publisher such as CU addresses a public figure or matter of public controversy, it does not receive lessened First Amendment protection merely because its speech relates to a business or a commercial product.

convincing evidence that CU acted with reckless disregard of the truth in 1996 (after the Samurai was no longer even being sold) when it restated that testing in 1988 had disclosed that the Samurai has a "propensity to roll over" and "easily rolls over in turns." Pet. App. 34a-35a (Graber, J.). *Contra* BIO 8-11 (contesting other statements by CU that the court of appeals deemed not actionable). Suzuki speculates that CU – the nation's most respected consumer testing organization – engaged in a massive conspiracy, abandoning the organization's principles and risking its very existence, in order to undermine the reputation of an SUV that was produced by a manufacturer of cars that CU had repeatedly praised. Eschewing record citations for rhetoric and speculation derived from its own evidence in isolation, Suzuki ignores the undisputed facts found by the district court and not contested by Suzuki on appeal that preclude a jury from finding by clear and convincing evidence that CU spoke with actual malice[3]:

- In contending that CU was hostile to the Samurai or tested it expecting it to tip up, Suzuki all but ignores (just as the Ninth Circuit deemed entirely irrelevant) that CU had good reasons to be seriously concerned that the Samurai was hazardous. Suzuki fails to mention prominent reviews finding a rollover propensity in the *New York Times*, the *Washington Post*, and elsewhere. Suzuki only barely acknowledges the extensive NBC-TV report finding that the Samurai dangerously tips up, and (except for an inscrutable reference to post hoc analysis of the size of a bump (see BIO 13 n.5)) skips over the fact that CU's test Samurai rolled onto its side during normal driving. See Pet. 6.

- Suzuki relies on inferences it would draw from alleged statements at the test facility and the fact that staff cheered when the Samurai tipped up while driven by Dr. Pittle. BIO 6-7. "But even if CU's preconception were entirely arbitrary, these fleeting remarks – three of which are no more than inane

---

[3] At the summary judgment stage, such findings of undisputed fact, "although not required, frequently are helpful." Wright & Miller, Federal Practice & Procedure § 2716, at 280-81 (2000). Contra BIO 3 & n.1.

schadenfreude – would still be insufficient to support a finding of actual malice" (Pet. App. 62a-63a (Kozinski, J.)) because Suzuki ignores the uncontested *direct* evidence, in the form of CU's voluminous research, testing, and editorial files as well as sworn affidavits from the employees involved, that no CU employee was in any respect instructed to skew the testing of the Samurai. Compare Pet. App. 126a ¶¶ 158-59 with BIO 7 (baldly asserting that CU "manufactur[ed]" the tip-ups and that a CU employee made "threats to the testing staff"). Suzuki's failure to mention the undisputed fact that the staff also cheered on runs by Dr. Pittle (who is not a professional driver) in which *no* tip-up occurred demonstrates how profoundly misguided it is for the court to consider only one side's evidence in isolation.

• While citing criticism of CU's test methodology after the 1988 *Consumer Reports* review (see BIO 11), Suzuki ignores not only that NHTSA found that CU's tests raised concerns, but also the many other events that *confirmed* the conclusions that CU had reached in 1988 before it made the 1996 statements in question – *e.g.*, that Suzuki was sued by several states and settled; that a federal court sanctioned Suzuki for *deliberately concealing* the risk of rollovers; that a British consumer testing organization found the same rollover risk; and that Suzuki had not sued CU in the eight years since the initial review. Suzuki also absurdly asserts that "expert testimony reveals that a tip-up of the Samurai could *only* be achieved deliberately" (BIO 8 (emphasis added)), ignoring the more than 200 people who *died* in Samurai rollovers (who presumably did not tip the car "deliberately"), as well as its many settlements of rollover suits. See generally Pet. 8.

• Finally, this case does not come close to a fact-bound fight over "credibility." Contra BIO 23-25. The credibility of the publisher is at issue in *every* libel and defamation case, such that if Suzuki is right, such disputes will *always* preclude summary judgment. Here, there is only one genuine credibility dispute: whether, as a disaffected former CU employee claims, Irwin Landau actually stated to someone, "If you can't find someone to roll this car, I will." Pet. App. 5a. Assuming for purposes of summary judgment that this statement occurred, there is no

evidence that it was intended or taken seriously. To the contrary, the district court found it *undisputed* that no CU employee was instructed to manipulate the testing. Pet. App. 126a ¶¶ 158-59. It therefore cannot reasonably be said, even crediting this testimony, that there is "*clear and convincing*" evidence that CU acted with reckless disregard for the truth. To the contrary, as thirteen judges have found, the evidence on the whole is "one-sided" in CU's favor.

2. The Ninth Circuit thus erred as a matter of law when it considered Suzuki's evidence in isolation. Suzuki attacks a straw man when it calls "obviously false" the claim "that the [Ninth Circuit] majority failed to conduct any independent review *at all*." BIO 16 (emphasis added). In fact, as petitioner now shows, the Ninth Circuit held that on summary judgment, although the "independent examination" rule nominally applies, it merely permits the court to review the record as a whole for evidence supporting the non-moving party. This holding directly conflicts with the articulation and application of the rule by other circuits. See Pet. 19-22.

a. Although Suzuki contends that the Ninth Circuit applied the "independent examination" rule just as it would have after trial (see BIO 17), each statement it cites is either taken out of context or offers Suzuki no support:

First, Suzuki's quotation of the panel opinion omits its actual holding. The court explained, "*While it is true that* we must independently examine the record when reviewing the grant of summary judgment" (Pet. App. 14a (added emphasis is on language omitted by Suzuki)), that examination is extremely limited on summary judgment: "Under the independent examination rule, we 'exercise our independent judgment' in evaluating the lower court's opinion, rather than granting it any deference. In other words, *we review the district court's decision de novo*." *Id.* (emphasis added). That rule eviscerates "independent examination" because the court already "review[s] de novo the trial judge's determination * * * in every case" on summary judgment. *Id.* 51a (Kozinski, J.).

Second, nothing on Pet. App. 15a & 16a, which Suzuki cites without elaboration, supports Suzuki's position. To the

contrary, the Ninth Circuit there held that it "applies the *normal* summary judgment standards to the issue of actual malice" (Pet. App. 15a (emphasis added)) and that CU could not secure summary judgment because Suzuki could prevail on a "plausible" reading of *its* evidence (*id.* 16a). Most important, the majority acknowledged – but expressly refused to follow – the cases that CU had cited in which courts had applied the "independent examination" rule as articulated in *New York Times*, holding that these cases were inapposite because "all involve[d] the review of a judgment rendered *after trial*." *Id.* (emphasis added). Pet. App. 15a-16a n.10. That was precisely Suzuki's argument below. Suzuki C.A. Reply Br. 5 (arguing that cases which CU cited, and Ninth Circuit subsequently refused to follow, "articulate the standard for judicial review after a *verdict*, not at summary judgment" (emphasis in original)).

Third, Suzuki's quotation of Judge Graber once again omits her conclusion. Judge Graber wrote, "*Although* the independent examination rule applies at the summary judgment stage" (Pet. App. 30a (added emphasis is on language omitted by Suzuki)), "[t]here are good reasons why courts must apply the independent examination rule *differently* in the summary judgment context than when reviewing a judgment entered after a full trial" (*id.* 32a). She reiterated that "we must apply the independent examination rule *differently* than we would if we were reviewing an actual-malice finding made after a full trial" (*id.* 32a-34a (emphases added)).

Fourth, Suzuki's claim that the dissent "acknowledg[ed] [that] the majority recognized the applicability of independent examination rule" (BIO 17 (citing Pet. App. 39a)) is seriously misleading because it omits the dissent's conclusion that the majority's application of the rule "*is empty*" and "strip[s] the independent examination rule of its intended purpose and meaning" (Pet. App. 39a-40a (emphasis added)).

b. Although Suzuki contends that the Ninth Circuit reviewed the "whole record," the critical point is that (as the petition explained) the court held that it could do no more than "review[] the record to identify evidence *favoring the plaintiff*."

Pet. 17. As Judge Kozinski explained, the court "doubtless perused the record with great care *in search of something to support Suzuki's case*." Pet. App. 72a (emphasis added). The three citations from the opinion offered by Suzuki (see BIO 17-18) actually prove that CU's reading is correct – that is, that the Ninth Circuit held that it could consider only Suzuki's evidence:

First, Suzuki's quotation from Judge Graber omits her conclusion that only the plaintiff's evidence is relevant: "[W]e are required to examine the entire record in determining whether *the nonmoving party* has presented evidence sufficient to allow a reasonable jury to conclude, by clear and convincing evidence, that a public figure has proven actual malice." Pet. App. 30a (emphasis is on language omitted by Suzuki).

Second, contrary to Suzuki's claim that "both Judge Tashima and Judge Graber repeatedly referred to 'the record,' without any suggestion that CU's evidence was being excluded" (BIO 18), the court of appeals in fact specified that only the non-moving party's evidence is relevant on summary judgment. Contrary to Suzuki's misleading suggestion that the district court found "cartloads" of evidence supporting its claim of actual malice (BIO 13 (quoting Pet. App. 83a)), the court actually found "cartloads" of evidence that produced more than 400 findings of undisputed fact supporting *CU*. The court of appeals nonetheless considered only "*the evidentiary basis for Suzuki's claims*," holding that "*[t]his evidence* is adequate to preclude summary judgment" and that a "permissible inference of reckless disregard follows from *this evidence* of 'rigged' testing." Pet. App. 20a-21a (emphases added). The majority then acknowledged that "CU has offered evidence of its accuracy in its reporting" but refused to consider that evidence because, in its view, the legal question was merely "whether there is adequate evidence to support the contrary view – namely, that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard, of its falsity. While it may be true that CU's evidence of meticulous reporting ultimately has more weight than Suzuki's evidence of actual malice, *that is not a question to be resolved here*." *Id.* 19a-20a (emphasis added).

Third, Suzuki's claim that the majority's opinion "repeatedly cited and analyzed evidence that CU had presented in its defense" (BIO 18) rests on a single citation to Pet. App. 28a, where the majority noted that "CU's discussion of the rollover statistics or its criticisms of Suzuki's own accident avoidance tests * * * does not demonstrate CU's purposeful avoidance of critical facts." But that statement addresses only whether there was evidence that CU had engaged in the purposeful avoidance of the truth by not responding to NHTSA's criticism. See Pet. App. 23a-29a ("Purposeful Avoidance" (title)). As to the larger question of whether there was sufficient evidence that CU exhibited reckless disregard for the truth, the court held that only Suzuki's evidence was relevant. See *supra* at 6.

3. The circuit conflict created by the Ninth Circuit's ruling arises from an ambiguity in this Court's precedents that only this Court can resolve. *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), held that the *New York Times* "clear and convincing evidence" standard applies at the summary judgment stage. *Masson* v. *New Yorker Magazine*, 501 U.S. 496 (1991), "reiterated and applied the standards from *Anderson*." BIO 16. Although neither case addressed the independent examination rule, *Anderson* "sends conflicting signals to trial courts" regarding how to evaluate summary judgment motions on the question of actual malice. 477 U.S. at 265 (Brennan, J., dissenting). See also *id.* at 269 (Rehnquist, J.). On the one hand, *Anderson* states that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249. The Ninth Circuit thus reads *Anderson* to preclude "weighing" the evidence even to the extent of assessing the strength of both the plaintiff's and the publisher's evidence, albeit construed in the light most favorable to the plaintiff, in order to determine whether a jury could find, based on the entire record, that there is "clear and convincing" evidence of actual malice. See Pet. App. 14a-15a.

On the other hand, *Anderson* requires the court to determine, on the basis of the "quantum and quality of proof" as well as the "character" and "caliber" of all the evidence, whether the record

is "so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-52, 254; see Pet. 19-22 (collecting cases from the Second, Eighth, Ninth, and D.C. Circuits as well as state courts). Other circuits, unlike the Ninth Circuit, accordingly construe contested evidence in the plaintiff's favor without finally "determining the truth" of any contested fact, but apply the independent examination rule to determine from the whole record whether a plaintiff could prevail at trial in a judgment that the court would not overturn as contrary to the First Amendment. See Pet. 19-21. As Judge Kozinski explained, and other circuits hold, courts must "resolv[e] the predicate factual disputes in the plaintiff's favor," but then "take the further step of independently 'determin[ing] whether the record establishes actual malice with convincing clarity.'" Pet. App. 51a-52a (quoting *Bose*, 466 U.S. at 514). This case presents the opportunity to resolve the ambiguity in *Anderson* and the resulting circuit conflict. See generally *Summary Misjudgment: The U.S. Supreme Court Faces Its Most Important Libel Law Ruling In Decades, If The Justices Will Only Take The Case*, Editor & Publisher, Sept. 29, 2003, at 9.

II. Certiorari Is Warranted To Review The Ninth Circuit's Holding That Publishers May Be Held Liable Based On Their Disagreement With The Government Or Their Financial Condition.

This case also involves the court's obligation to make an independent judicial determination whether the plaintiff's claim rests on a theory that is inconsistent with the First Amendment. Here, it does. The Ninth Circuit held that CU could be found liable on the theory that the "technical criticism of a government agency" (BIO i) – which CU had criticized as a "reluctant watchdog" – constitutes "purposeful avoidance of the truth." Suzuki does not dispute that no other state or federal court has *ever* accepted anything remotely like its theory. See Pet. 27-28 (collecting cases). CU disagreed with a regulatory agency on what Suzuki admits is a "scientific[]" and "technical" question (BIO 4, 26) with respect to which the government admitted "there is no standard, accepted test or series of test procedures" (Pet. App. 288a). Indeed, Suzuki now is on the losing side of "a

30-year debate about how the government should deal with rollover dangers, especially among higher-riding [SUVs]." Harry Stoffer, *Driving Tests Expand Rollover Ratings*, Automotive News, Oct. 6, 2003. Further, CU did not "avoid" the issue: the entire thrust of CU's extensive internal analysis (Pet. App. I) and its published response (*id.* G) was that CU's testing methodology *is* valid, and that (as the district court found undisputed) the government "*was misled by Suzuki*" (Pet. App. 181 ¶ 381 (emphasis added)), which was the source of the government's data.

The Ninth Circuit also inexplicably held that CU's alleged financial distress in *1988* could contribute to a jury's finding of "clear and convincing evidence" that CU exhibited reckless disregard for the truth when it spoke in *1996*. Suzuki parrots the Ninth Circuit's reliance on *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 668 (1989), which rejected a publisher's argument that "evidence concerning motive or care never bears any relation to the actual malice inquiry." See BIO 28. But CU's allegedly poor financial *condition* is not the same thing as a *motive* to lie. In *Harte-Hanks*, there was "substantial probative evidence" of financial motive because the defendant sought to publish the story in question in order to "scoop[]" and "undermin[e]" a publisher with which it "was engaged in a bitter rivalry." 491 U.S. at 665 n.6. The Ninth Circuit's holding, in practice, means that there is evidence of actual malice against most publishers, given the general financial plight of the industry, and furthermore that not-for-profit publishers like CU receive less First Amendment protection than more financially successful profit-seeking ventures. See Cons. Fed'n Br. 5.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Joseph W. Cotchett
Frank Pitre
Steven N. Williams
COTCHETT, PITRE, SIMON & MCCARTHY
840 Malcolm Rd., Suite 200
Burlingame, CA 94010

Michael N. Pollet
(Counsel of Record)
CONSUMERS UNION OF UNITED STATES, INC.
101 Truman Ave.
Yonkers, NY 10703-1057
(914) 378-2000

Barry G. West
Corey E. Klein
GAIMS, WEIL, WEST & EPSTEIN, LLP
1875 Century Park East
Los Angeles, CA 90067

October 8, 2003